1404 ARSON OF A BUILDING OF ANOTHER — § 943.02(1)(a)

Statutory Definition of the Crime

Arson, as defined in § 943.02(1)(a) of the Criminal Code of Wisconsin, is committed by one who, by means of fire, intentionally damages any building of another without consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally damaged a building[1] by means of fire.

   "Damaged" means injured, charred, defaced, and includes smoke damage.[2]

   "Intentionally" means that the defendant must have had the mental purpose to damage the building of another by means of fire or was aware that (his) (her) conduct was practically certain to cause damage to the building of another.[3]

2. The building belonged to another person.[4]

3. The defendant damaged the building without the owner's[5] consent.

   "Without consent" means that there was no consent in fact.[6]

4. The defendant knew that the building belonged to another person and knew that the other person did not consent to the damage of the building.

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Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1404 was originally published in 1969 and revised in 1977, 1991, and 1992. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

1. This instruction has never included a definition of "building." In State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

Kuntz was decided as the 1992 revision of Wis JI-Criminal 1404 was being prepared for publication. The Committee will be pursuing the issues raised by the decision in the hope of developing a rationale for addressing them. At the present time, a trial court obviously must avoid a statement like the one reviewed in Kuntz. If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

Wisconsin appellate courts have addressed the meaning of "building" on two occasions that are not directly on point but may be of some usefulness. In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue

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was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

2. "The word 'damage' includes, in addition to what is thought of as damage in the narrow sense, anything from mere defacement and mutilation to total destruction." 1953 Judiciary Committee Report on the Criminal Code, p. 97 (Wis. Legislative Council, 1953). The quoted material referred to "damage" as used in the criminal damage to property statute; the meaning of "damage" was considered to be the same for arson, which was called "Criminal Damage By Fire or Explosives" in the original 1953 draft of the Criminal Code. Ibid, p. 99. The name of the offense was changed to "arson" before the draft was enacted. The recodification of the arson statutes was not intended to change the substantive law, although "by means of fire, intentionally damages," was substituted for "sets fire to or burns or causes to be burned" under the pre-1956 law. Bill Platz commented on this change in his law review article on the Criminal Code revision.

> This change is not intended to produce any different result, although conceivably the new language could be construed to include smoke damage without actual charring. However, such cases should be prosecuted under Code § 943.01 [criminal damage to property], or as attempted arson under Code § 939.32 depending on the facts.

Platz, "The Criminal Code: Thumbnail History of the Code" 1956 Wis. Law Rev. 350, 374

The Committee concluded that any damage, including smoke damage, is sufficient under the arson statutes as long as the damage is caused "by means of fire."

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3. This is the definition of "intentionally" provided in § 939.23(3). See also Wis JI-Criminal 923A and 923B for further discussion of "intentionally."

The footnote to the 1980 version of this instruction provided as follows: "The defendant may set fire to furniture with mental purpose to damage only the furniture; he may be found guilty of arson of the building though indifferent to that result." This statement was cited and applied in State v. Thompson, 146 Wis.2d 554, 431 N.W.2d 716 (Ct. App. 1988). The court found that the defendant's actions of placing crumpled newspapers against a wall under drapes and igniting them "manifest an intent to damage the building." 146 Wis.2d 554, 563. Also see State v. Dunn, 121 Wis.2d 389, 359 N.W.2d 151 (1984), discussing the sufficiency of the evidence at a preliminary examination to show intent to damage the building.

4. If it is necessary to define "building of another," the Committee suggests the following: "A building in which a person other than the defendant has a legal or equitable interest which the defendant has no right to defeat or impair, even though the defendant may also have a legal or equitable interest in the building." This is based on the definition provided in § 943.02(2). "Another" under this definition includes a mortgagee. State v. Phillips, 99 Wis.2d 46, 289 N.W.2d 239 (1980). (The state had to rely on the mortgagee in the Phillips case because the owner of the building would not complain.)

5. The instruction refers to damage caused without consent of the "owner," but the statute does apply to damage caused without consent of any other person who has a right in the building superior to that of the defendant. In a case involving someone other than the owner, this part of the instruction would have to be modified.

6. If further definition of "without consent" is necessary, see § 939.22(48)(a)-(c) and Wis JI-Criminal 948.

In State v. Shoffner, 31 Wis.2d 412, 143 N.W.2d 354 (1958), the defendant contended that proof was lacking on the "without consent" element because the state produced the testimony of the owner but not that of his wife, who owned the property jointly with her husband. The court rejected the claim, finding that it was sufficient to show that one co-owner did not consent, since "the only reasonable inference which can be drawn from the undisputed facts in this case is that Shoffner acted without the consent of any owner." 31 Wis.2d 412, 430.

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